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AND
BRIEFS

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IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does *Atkins* v. *Virginia* delegate to unaccountable private organizations the power to redefine the content of the Eighth Amendment rule identified in *Atkins*, rendering unconstitutional state laws (either statutory or case law) that comply with the scope of the *Atkins* rule as initially announced?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an attempt to overturn a judgment that became final on direct appeal over 12

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1. Both parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

years ago by claiming that the state must change the standard it uses to determine whether a murderer is intellectually disabled in order to keep up with current fashion. Such a constitutional moving target would further obstruct the already obstructed path of justice in cases of capital murder. No showing has been made that such continual revision is needed to exclude the class of persons for whom *Atkins* v. *Virginia* found a national consensus to exist. This obstruction of justice is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Prior to the crime in this case, petitioner Bobby James Moore had already committed numerous crimes. He had three prior convictions for burglary and one for aggravated robbery. *Moore* v. *Johnson*, 194 F. 3d 586, 598 (CA5 1999). In addition, he was positively identified at his first trial of having committed robberies of two other small grocery stores in the weeks prior to the crime in this case. *Ibid.*

On April 25, 1980, Moore and two accomplices attempted to rob the Birdsall Super Market in Houston, Texas. *Moore* v. *State*, 700 S. W. 2d 193, 195 (Tex. Crim. App. 1985). James McCarble, 72, a longtime employee of the store, was working there among others. Edna Scott, another employee, shouted that the store was being robbed and dropped to the floor. Then she heard a noise, and McCarble fell on the floor right beside her. She "observed that 'Jim's head [had been shot] off.' " *Id.*, at 195-196.

Moore was convicted and sentenced to death, and the Court of Criminal Appeals affirmed. *Id.*, at 207. Habeas corpus proceedings eventually ended with a grant of relief for ineffective assistance of counsel as to penalty only. See *Moore* v. *Johnson*, 194 F. 3d, at 622.

In the course of his habeas corpus proceedings, Moore presented the testimony of Dr. Robert Borda. Dr. Borda did not diagnose Moore as intellectually disabled. See *Ex parte Moore*, 470 S. W. 3d 481, 495 (Tex. Crim. App. 2015).

In 2001, the year before *Atkins* v. *Virginia*, 536 U. S. 304 (2002), but long after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), a new sentencing hearing was conducted. Under *Penry*, the defendant had the right to have retardation (as the condition was then known) considered in mitigation, but Moore did not claim he was retarded. Instead, he presented the testimony of social worker Bettina Wright, who "concluded that [Moore] 'was nowhere near retarded.' "[2] *Ex parte Moore*, 470 S. W. 3d, at 503. Moore was again sentenced to death. *Id.*, at 484. The Texas Court of Criminal Appeals affirmed in an unpublished decision.

The present habeas corpus proceeding was filed under Article 11.071 of the Texas Code of Criminal Procedure. Under that statute, the application is filed in the convicting court but the writ is returnable in the Court of Criminal Appeals. *Id.*, § 4(a). When an evidentiary hearing is warranted, the convicting court holds a hearing, *id.*, § 9(a), and transmits to the Court of Criminal Appeals, among other things, its findings of fact and conclusions of law. *Id.*, § 9(f)(1)(F). The Court of Criminal Appeals can adopt these findings, but it remains "the ultimate factfinder in [the] case." *Ex parte Moore*, 470 S. W. 3d, at 489.

The Court of Criminal Appeals restated its test for intellectual disability. See *id.*, at 513-514 (citing, *inter alia*, *Ex parte Briseno*, 135 S. W. 3d 1, 7 (Tex. Crim.

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2. A rule that a defendant is estopped from making an *Atkins* claim in these circumstances would be proper, but Texas does not assert such a rule.

App. 2004)). *Briseno* adopted the then-current AAMR definition, or alternatively the Texas Health and Safety Code codification of it for the purpose of mental health services, with a reference to the then-current DSM-IV for the definition of "significantly subaverage intellectual functioning." *Briseno*, at 7, and n. 24.[3]

Applying this long-established three-part test, the court found that Moore had not established that he is intellectually disabled. Among the various intelligence tests administered, the court appropriately gave the greatest weight to the Wechsler scales (WISC for children; WAIS for adults), a preference thoroughly supported by expert opinion and the academic literature. The court discounted one of the three, however, the one administered in preparation for the present case, based on expert testimony of malingering. See *Ex parte Moore*, 470 S. W. 3d, at 518-519. Considering the two best scores and taking into account the standard error of measurement,[4] the court found that the petitioner's "intellectual functioning [is] above the intellectually disabled range."

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3. The "urban legend" that the standard is based on literature rather than science merely because of a passing reference in the introductory discussion of the opinion, see *id.*, at 6, is preposterous. It would be a sad day for judicial writing if a precedent could be discredited merely because the author spiced it up with a literary or cultural reference. Is *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2415 (2015), "based on" a comic book? Is *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 164 (1972), "based on" a poem?

4. Even when the lower tail of the two-sigma interval dips barely below 70, that represents only a very small probability that the true IQ is below 70. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Hall* v. *Florida*, No. 12-10882, pp. 13-16, available at http://cjlf.org/program/briefs/HallF.pdf.

While this finding alone would be sufficient to preclude intellectual disability under the conjunctive test, the court went on to consider the testimony on adaptive behavior. The state's expert testified that Moore's "level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis." *Id.*, at 526. The court found her opinion to be "far more credible and reliable than those of applicant's experts." *Id.*, at 524. On these facts, the court found that Moore was not entitled to relief. *Id.*, at 527-528.

SUMMARY OF ARGUMENT

No other mental issue in the criminal law is controlled by clinical definitions which may be changed from time to time by private organizations. Competency to stand trial, competency to exercise the right of self-representation, competency for execution, and being not guilty by reason of insanity are all based on standards established in law and not dependent on whether the defendant fits the criteria for any specific mental diagnosis. *Atkins* v. *Virginia* is based on a national consensus which is not necessarily congruent with the ever-expanding scope of intellectual disability as defined by private organizations.

Individualized sentencing procedures in which the sentencer can weigh aggravating and mitigating circumstances, as they exist for the particular offense or particular offender, is the cornerstone of this Court's modern capital punishment jurisprudence. Categorical exemptions from punishment based on the characteristics of the offender run contrary to this principle, effectively requiring that the typical characteristics of a class of persons be deemed to necessarily outweigh all aggravating circumstances, even though the individual

defendant may be far from typical. Given this tension, categorical exemptions should be narrowly construed and applied only where the justifications for them are strongest. The rationale of *Atkins* is at its weakest in borderline cases where a person may be considered intellectually disabled or not depending on which of the multiple definitions is used. States should, at a minimum, be allowed to choose among these definitions.

Giving legal force to definitions established by private organizations distorts the definition-making process. These organizations have an interest in influencing the outcome of cases, and giving their definitions controlling force provides an incentive for them to write expansive definitions.

The APA's and AAIDD's revised definitions are social and policy documents. They do not represent unanimous opinion in the profession, and they are not based on science as that term is generally understood. The DSM-5 has been severely criticized within the psychiatric profession for the secretive and unscientific manner in which it was created, for expanding the scope of what is considered mental illness, and for promoting "false positives," diagnosis of people who are not really ill. The AAIDD's own publications demonstrate conclusively that there is nothing close to unanimity on the definition of intellectual disability. They also indicated that policy considerations, including expanding the class of people who will be exempt under *Atkins*, enter into the consideration.

ARGUMENT

I. No other mental issue in the criminal law is controlled by a definition from clinical practice, and there is no reason the *Atkins* issue should be.

Petitioner in this case misstates the issue presented as whether a state court can "prohibit the use of current medical standards on intellectual disability." The position he actually asserts to this Court is that the state court is obligated to use clinical definitions recently adopted by private organizations as the standard by which it decides the legal question of whether a murderer is exempt from capital punishment by reason of intellectual disability. In *no* other area of criminal law where a mental excuse or exemption is claimed is such a clinical definition deemed controlling.

We can begin with competency to stand trial.

> "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975).

Where in the DSM-5[5] or its predecessors does one find this diagnosis? Nowhere. It is not a diagnosis. The legal system is concerned with the effects of the defendant's mental condition on its obligation to provide a fair trial, while psychiatric diagnosis is concerned with providing appropriate treatment and

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5. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

supportive services. Given these different purposes, it is not surprising that different criteria are applied.

A different rule applies to the competence of the defendant to conduct his own defense. "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana* v. *Edwards*, 554 U. S. 164, 178 (2008). The *Edwards* Court considered the input of the American Psychiatric Association (APA) to the effect that " 'symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation,' " *id.*, at 176 (quoting APA brief), but again it did not adopt any clinical definition of an illness as the standard.

Moving from procedure to substance, *Clark* v. *Arizona*, 548 U. S. 735, 749 (2006), upheld a definition of the insanity defense that was even more restrictive than the much-criticized *M'Naghten* test dating back to Victorian England. The Court noted, "medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement." *Id.*, at 752. *Clark* cited with approval *Leland* v. *Oregon*, 343 U. S. 790, 801 (1952), which held that the "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility."

Finally, in *Panetti* v. *Quarterman*, 551 U. S. 930, 955 (2007), the question was not whether Panetti met the diagnostic criteria for a psychotic disorder, whether schizophrenia, schizoaffective disorder, or anything else. He clearly was psychotic. "The legal inquiry

concerns whether these delusions can be said to render him incompetent." *Id.*, at 956.[6] Neither of the competing standards from *Ford* v. *Wainwright*, 477 U. S. 399 (1986), is framed in terms of a clinical diagnosis. See *Panetti*, at 948-949, 958-959. Although *Panetti* does not establish a standard, *id.*, at 960-961, it is clear from the opinion that no psychiatric diagnosis constitutes the standard. A psychotic disorder is "[t]he beginning of doubt about competence," *id.*, at 960, not the final conclusion of incompetence.

All of these cases indicate that a mental defense should not be tightly bound to a clinical definition, but *Clark* appears to present the closest parallel to the present case as it involves a substantive question going to the propriety of the judgment as opposed to competence to go forward with a particular portion of the proceedings. There has long been a national consensus that a person who is insane should not be convicted of an offense, but there is also substantial and long-standing disagreement on how to define that category. Similarly, this Court has found that there is now a national consensus against executing persons with intellectual disability, regardless of the circumstances of the crime, but has acknowledged the widespread disagreement on how to define that category.

The answer is to allow the states the same latitude on this question that they have on the insanity question. Convicting an innocent person of murder is a vastly greater injustice than the execution of any guilty

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6. The great irony of this case is that Panetti was probably sentenced to death because of an overly expansive view of his constitutional rights. If he had been tried after *Indiana* v. *Edwards*, *supra*, he would have had trial counsel who could have presented his mental illness properly to the jury.

murderer, and there is no reason for the states to have any less latitude on sentencing than they have on guilt.

The *Atkins* rule will not be nullified by allowing the states such latitude so long as this Court retains the ability to rein in radical departures from the national consensus or clearly erroneous misuses of assessment instruments.[7] At a minimum, the states should have the ability to choose among any of the definitions that have seen broad acceptance from the time of *Atkins* to the present.

II. Categorical exemptions are contrary to the principle of individualized capital sentencing and should be narrowly construed.

Atkins v. *Virginia*, 536 U. S. 304 (2002), is one of two precedents of this Court establishing a categorical exemption based on the personal characteristics of the murderer regardless of the circumstances of the crime.[8] The other is *Roper* v. *Simmons*, 543 U. S. 551 (2005), exempting all murderers a day or more short of their 18th birthdays at the time of the crime. In effect, *Atkins* and *Roper* require that a single mitigating circumstance be deemed to necessarily outweigh any and all aggravating circumstances that may be present without any individualized consideration of the circumstances of the particular offense or of any other characteristics of the offender, such as criminal record.

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7. The failure to consider the standard error of measurement in *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), is an example of the latter.

8. Categorical exclusions for offenses rather than offenders, see, *e.g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008), are distinguishable and need not be considered here.

For four decades now, this Court has insisted that individualized sentencing is a constitutional imperative in capital cases. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (lead opinion). States have been constitutionally forbidden from identifying a single factor and deciding in advance that the presence of this factor requires a death sentence without that individualized consideration. Even in the exceptionally compelling circumstance of a life-sentenced murderer who kills again within prison, the Court insisted that the Constitution requires consideration of the individual circumstances of the particular case. See *Sumner* v. *Shuman*, 483 U. S. 66, 80-82 (1987).

A categorical exemption from the death penalty based on a single characteristic suffers the same flaw as a mandatory death penalty. "It treats all persons [classified within a given category] not as uniquely individual human beings, but as members of a faceless, undifferentiated mass . . . ." Cf. *Woodson*, 428 U. S., at 304.

In *Penry* v. *Lynaugh*, 492 U. S. 302, 322-323 (1989), this Court recognized that mental retardation was a powerful mitigating factor with regard to a defendant's culpability, and it deserved to be weighed in the balance with the other factors. Giving it conclusive weight by itself, however, was not warranted, in part because of the wide variations in abilities among persons who might qualify for the "retarded" label.

> " 'The term *mental retardation*, as commonly used today, embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handi-

> caps, stigmata, and psychologically disordered states.'" *Id.*, at 338 (opinion of O'Connor, J.) (quoting AAMR Manual).[9]

Both holdings were consistent with the theme of individualized sentencing that has been a central pillar of this Court's capital sentencing jurisprudence from *Woodson* forward.

In *Atkins*, the Court changed course, in part by accepting as if universally true of all intellectually disabled persons the sweeping generalities rejected in *Penry*. See 536 U. S., at 318-321. The *Atkins* opinion notwithstanding, it surely is not true that *all* persons diagnosable as intellectually disabled *always* act on impulse rather than premeditation, *always* follow others rather than lead or act alone, and are *necessarily* so cognitively deficient as to be undeterrable. See Mossman, *Atkins v. Virginia*: A Psychiatric Can of Worms, 33 N. M. L. Rev. 255, 273 (2003).

Atkins says that persons with intellectual disability "by definition . . . have diminished capacities . . . to abstract from mistakes and learn from experience, [and] to engage in logical reasoning . . . ." 536 U. S., at 318. Yet Penry clearly learned from experience and could reason logically. From his previous rape conviction, see *Penry* v. *State*, 903 S. W. 2d 715, 761 (Tex. Crim. App. 1995), he learned that leaving a rape victim alive would result in getting caught, so he logically went to Pamela Carpenter's house with the premeditated design to kill her after he raped her. See *id.*, at 755.

In essence, the *Atkins* Court engaged in the same kind of sweeping generality in disregard of the facts of

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9. Part IV-C of the opinion is not the opinion of the Court, but it is the opinion concurring in the judgment on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

individual cases that this Court forbade the states to employ in *Sumner*.

To the extent that *Atkins* rests on a generalized characterization of persons with intellectual disability, those sweeping assumptions are at their weakest in the very cases at issue here: the ones near the borderline of qualification for the diagnosis such that a defendant might qualify under one definition but not another. To the extent that *Atkins* rests on a consensus of the American people that persons with intellectual disability should never be executed regardless of their crimes, that finding of consensus is extremely doubtful as applied to persons at the borderline that most laymen would not recognize as intellectually disabled. See Covarrubias, Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants, 11 Scholar: St. Mary's Law Review on Minority Issues 413, 440 (2009) (noting most laypersons think of retarded persons as far more disabled than the mildly retarded actually are).

Finally, it is important to bear in mind that a finding that a person does not qualify for the categorical exemption of *Atkins* does not mean that person will necessarily be sentenced to death. The procedural part of *Penry* is still the law, and capital defendants are still entitled to its protection. Before a murderer can be sentenced to death, he is entitled to a weighing by the sentencer of the aggravating and mitigating facts of his individual case, and his actual mental impairment is a powerful factor in that determination. In such a proceeding, the question of whether an impaired defendant falls slightly on one side or the other of the retardation line is immaterial. Between *Penry* and *Atkins*, such defendants were sometimes referred to as "retarded" by courts properly weighing their impair-

ments without concern for precise line-drawing. See, *e.g.*, *Bobby* v. *Bies*, 556 U. S. 825, 828 (2009).

The only consequence of a negative *Atkins* finding is that the defendant receives an individualized determination of whether his impairment plus any other mitigation does or does not outweigh the aggravating circumstances of his offense and prior offenses, rather than an outcome mechanically determined by a single factor, ignoring all others. This is not a result that calls for going to extraordinary lengths to avoid, particularly in a borderline case where the rationale for the *Atkins* rule is weakest. On the contrary, this is the path that is most likely to lead to a just result in the case.

With unbiased justice as the goal, it makes perfect sense to reserve the rule of *Atkins* for cases where it clearly applies and let the doubtful cases go to individualized sentencing with consideration of all the circumstances. As a constitutional mandate, *Atkins* should not be expanded beyond its original scope. If states want to extend the exemption into new territory by statute, they are, of course, free to do so, but this Court should not force the states to march in lockstep, especially not to the drumbeat of private organizations with an agenda to block as many death sentences as they can.

III. Giving legal force to definitions by private organizations distorts the definition-making process.

Petitioner and his supporting *amici*, including the American Psychiatric Association (APA) and the American Association on Intellectual and Developmental Disabilities (AAIDD), would have this Court believe that the new APA and AAIDD definitions are works of neutral, objective science. They are not, for the reasons explained in the Brief of Respondent and in Part IV of

this brief, *infra*. A related and very important concern is that giving legal effect to psychological definitions produced by private organizations may itself cause a distortion in the process of making these definitions, causing them to be different from the definition that would be established if it had no such effect.

The APA and the AAIDD once again appear in this case as *amici curiae* supporting the criminal defendant. They also supported the defendants in *Atkins* v. *Virginia* and in *Hall* v. *Florida*. To the best of *amicus* CJLF's knowledge based on a Lexis search, neither organization has ever filed an *amicus* brief in this Court in support of the prosecution. Even in *Indiana* v. *Edwards*, 554 U. S. 164 (2008), a highly unusual case where the APA might have been expected to support the prosecution, its brief was filed in support of neither party. Such a pattern establishes a powerful prima facie case of bias. Cf. *Miller-El* v. *Dretke*, 545 U. S. 231, 240-241 (2005).[10] When an organization leans in favor of criminal defendants generally, those leanings tend to be particularly strong in capital cases. If either of these organizations could reduce the number of capital sentences by making its definition of intellectual disability more expansive, could that incentive corrupt the final product?

In 2006, *amicus* AAIDD, then known as the American Association on Mental Retardation, was in the process of reconsidering its definition, and it published a book with a variety of perspectives from "a rare collection of leading thinkers in the MR [mental retar-

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10. CJLF also files almost entirely on one side, with *Powers* v. *Ohio*, 499 U. S. 400 (1991) (supporting defendant) and *Jennings* v. *Stephens*, 135 S. Ct. 793 (2015) (supporting neither party), being the exceptions. The difference is that we are candidly advocates for a cause and make no pretense otherwise.

dation] field." H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century xxiii (rev. ed. 2006).[11] While none of the chapters constitutes an official position of the organization, we can fairly assume that all the views stated are regarded by AAIDD as within the realm of reasonable disagreement among experts. We can also assume that the editors of the book are regarded by the organization as mainstream and not fringe thinkers in the field. This book provides a valuable insight into what really was involved in crafting the new definition, in contrast to the objective scientific process that the "topside" briefs in this case would have the Court believe.

The chapter that specifically addresses *Atkins* was written by the editors of the book, one of whom was an expert witness for the petitioner in this case. These authors advocate raising the IQ ceiling dramatically or abolishing it altogether, basing the diagnosis within the expanded or unlimited range solely on adaptive deficits and the developmental period criterion, and expanding "mild MR" to include the relatively large section of the population that would previously have been classified as "borderline" and not retarded as defined in *Atkins*. See Greenspan & Switzky, Lessons from the *Atkins* Decision for the AAMR Manual, in WIMR at 298.

The authors are candid about their motive. Their proposed solution is motivated in part by a desire to expand the number of people who would come within the categorical exclusion of *Atkins*. See *ibid*. These are people who, in the authors' opinion, are "deserving of protection," see *id*., at 298-299, but that does not mean

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11. This book is cited below as "WIMR." The subtitle alone is a strong argument against adopting the definition *de jour* as a constitutional mandate.

that they are within the national consensus that is the basis of *Atkins*.

This is a confession of political corruption of the definition process. The authors chosen by AAIDD to edit their book openly advocate revising the definition in order to change the law to conform to their own views of policy.

How can this Court depend on an organization's definitions and standards to inform its view of a scientific issue when the very act of depending on them may cause the organization to change them?[12] It would be folly to depend on them under these circumstances. It is one thing to say that courts can and should consider the views of professional organizations and quite another to delegate the definition of constitutional requirements to unelected and unaccountable private organizations with their own agenda. See *Bobby* v. *Van Hook*, 558 U. S. 4, 8 (2009). Judicial consideration of the APA and AAIDD positions should be conducted with a skeptical eye and a keen awareness that these organizations have policy agendas that influence their pronouncements.

IV. The APA's and AAIDD's revised definitions are social and policy documents, not unanimous and not science as generally understood.

Amici APA, *et al.*, represent to this Court that "there is unanimous professional consensus on the criteria applied to diagnose intellectual disability."

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12. There is a somewhat analogous problem in physics. At the subatomic level, the very act of observing something changes what one is observing. This conundrum underlies the Heisenberg Uncertainty Principle.

Brief for American Psychological Association, *et al.*, as *Amici Curiae* 7 (capitalization omitted).[13] This statement is demonstrably false. The APA Brief also treats the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-5") as if it were the definitive and universally accepted word of the mental health professions. Actually, that book is highly controversial and hotly disputed.

A. The Controversial DSM-5.

To say that the DSM-5 is controversial is an understatement. Professor Allen Frances of Duke University, chair of the DSM-IV revision, called the day of its final approval "the saddest moment in my 45 year career of studying, practicing, and teaching psychiatry." Frances, DSM-5 Is a Guide, Not a Bible: Simply Ignore Its 10 Worst Changes, available at http://www.huffingtonpost.com/allen-frances/dsm-5_b_2227626.html (Dec. 3, 2012) (as visited September 8, 2016). He called the new edition "a deeply flawed DSM-5 containing many changes that seem clearly unsafe and scientifically unsound," and he advised against "follow[ing] DSM-5 blindly down a road likely to lead to massive over-diagnosis and harmful over-medication." *Ibid.*

Professor Frances was by no means alone in this opinion. Professor J. C. Wakefield of New York University noted that the new edition "has been criticized for its revision process, goals and content." Wakefield, DSM-5, Psychiatric Epidemiology and the False Po-

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13. In this brief, we use "APA" standing alone to refer to the American Psychiatric Association, which is among the "*et al.*" on the brief listing the American Psychological Association first. We refer to that brief as the "APA Brief."

sitives Problem, 24 Epidemiology and Psychiatric Science 188, 188 (2015). The process described by Professor Wakefield, including secrecy and lack of documentation, should make courts very reluctant to rely on anything the DSM-5 says.

> "Most egregiously, the deliberations of the DSM-5 Scientific Review Committee, formed in response to the DSM-5 controversies to evaluate the strength of the scientific evidence for each proposed change and provide recommendations to the workgroups, are being kept strictly secret." *Id.*, at 189.

Incredibly for an organization that purports to be scientific, the APA required workgroup members to sign confidentiality agreements that limited their ability to speak in public about the changes. See *ibid.* "The needlessly secretive DSM-5 mindset [is] antithetical to both the appearance and reality of intellectual integrity . . . ." Not only does this mindset "short-change[] future scholarship," *ibid.*, but it severely undercuts the trust that courts can place in the product.

Even worse than the process is the "false positives problem." There are two kinds of errors in research and diagnosis. A "false positive" is finding something that does not actually exist, and a "false negative" is failing to find something that does exist.

> "The most vehement and sustained objections [to DSM-5] were aimed at the content of its diagnostic criteria. It was argued that the revised criteria illegitimately expanded psychiatric diagnosis into areas of normal-range distress and other problems in living, undermining the integrity of psychiatry as a medical discipline, obscuring the meaning of its research results and potentially leading to unwarranted and possibly harmful treatment." *Id.*, at 188.

"Many millions of people with normal grief, gluttony, distractibility, worries, reactions to stress, the temper tantrums of childhood, the forgetting of old age, and 'behavioral addictions' will soon be mislabeled as psychiatrically sick and given inappropriate treatment." Frances, *supra*.

If present trends continue, by DSM-8 we will all be mentally ill.

Specifically for developmental disabilities, the problem of false positives is greatly aggravated by the de-emphasis of the more objective intelligence testing and greater reliance on the more malleable and informant-dependent adaptive functioning. It is for this reason that two of the experts in AAIDD's book, writing from the perspective of researchers rather than service providers (or expert witnesses for defendants), recommended doing away with the adaptive skills element altogether and relying solely on intelligence testing.

> "First, the instruments designed to measure adaptive skills are simply not adequate. When the concept of adaptive behavior was first introduced to the definition in the 1960s [citation], it was criticized because measures of adaptive behavior were not well-standardized. Often, clinical judgment was substituted for a formal assessment of adaptive behavior. There tended to be low agreement between examiners when diagnosing impairment in adaptive behavior. Clinical judgment led to low agreement between examiners, and low agreement resulted in unreliable diagnosis [citation]." Detterman & Gabriel, Look before You Leap: Implications of the 1992 and 2002 Definitions of Mental Retardation, in WIMR 135, 138.

The APA may be unconcerned with false positives in this area. No concern is evident from its brief. This

Court, however, should be very concerned. A categorical exclusion from punishment is a drastic action, removing from the people of the state the sovereign authority they have always possessed to decide which murderers will be punished with death and which will not. A false positive wrongly removes the case from the normal weighing process and exempts a murderer from the punishment he may very well richly deserve. A false negative, on the other hand, merely remands the case to the normal weighing process where the defendant has the right under *Penry* and its progeny to present his impairment as mitigating to the jury and have them instructed to consider it, if he chooses to do so.

The traditional three-part test from the DSM-IV, with intellectual functioning two standard deviations below the mean as a conjunctive requirement with limitations in adaptive functioning, has important value in limiting the false positive problem. IQ testing is far more objective than adaptive functioning scales. Testing is done by objective examiners, while adaptive functioning depends on reports from people who know the defendant, who will very often be his family and friends and who may have been coached on their responses. States should not be forced to abandon this standard, which is written into their statutes in many states, on the say-so of a document which has been fiercely criticized within its profession for escalating the false positive problem.

B. Intellectual Disability as a Social Construct.

Binding the constitutional rule of *Atkins* to the frequently changing clinical definitions of intellectual disability would be particularly inappropriate because this diagnosis is different from a typical medical diagnosis and even from many psychiatric ones. For most

disorders, health professions have a keen interest in scientifically precise and accurate diagnosis because it is essential to providing the patient with safe and effective treatment. If a disease is caused by an infecting microbe, a physician must know which one in order to prescribe a medication that actually attacks that microbe. A psychiatrist must accurately diagnose mental disorders to know whether to prescribe an antipsychotic medication or an antidepressant one.

There is no similar constraint on the definition of intellectual disability because the diagnosis has generally been used to decide on eligibility for the provision of supports rather than treatment in the medical sense. As noted *supra*, at 15-16, and n. 11, the problem of definition is explored from several perspectives in a book published by *amicus* AAIDD.

> "[Mental retardation], particularly mild MR, is a socially constructed disability category rather than a naturally constructed quasi-medical category. . . .
>
> "The term 'disability' originated in the vocational rehabilitation field and is used to indicate that a person needs significant short- or long-term supports in order to be able to hold down a job, if he can at all. It is, thus, a bureaucratic category, usually defined by a committee, which may be influenced by political and economic considerations as much as by 'science,' and *the decision as to where to draw the line* between disability and nondisability, based on an estimate of the amount of supports needed to function normally, *is relatively arbitrary*." Greenspan, Mental Retardation in the Real World: Why the AAMR Definition Is Not There Yet, in WIMR 167, 171 (emphasis added); see also Mossman, 33 N. M. L. Rev., at 265 ("line . . . is a changing and arbitrary one").

Amici AAIDD, *et al.*, insist that their definition is a "scientific standard." See Brief for American Association on Intellectual and Developmental Disabilities, *et al.*, as *Amici Curiae* 27. In reality, the details of the definition are supported by little science. Critics of the "paradigm shift" in the definition of mental retardation since the 1990s have noted the lack of empirical evidence, see, *e.g.*, Baumeister, Mental Retardation: Confusing Sentiment with Science, in WIMR at 96, and the influence of advocacy motives.

> "We are solemnly alerted by the Committee [citation] that the paradigm shift 'necessitates . . . significant changes in one's thinking' [citation] and that service delivery now focuses on 'strengths and capabilities of the person, normalized and typical environments, integrated services with supports, and the empowerment of individuals served' [citation]. Quite aside from the obvious imprecision of this grandiose terminology (or utter inanity, such as 'empowerment'), *blatant and outright advocacy has no standing in construction of a clinical nosology*, no matter how philosophically honorable and well intentioned in principle." *Id.*, at 109-110 (emphasis added); see also MacMillan, Siperstein, & Leffert, Children with Mild Mental Retardation: A Challenge for Classification Practices—Revised, in WIMR 197, 200 ("designed for the goal of advocacy for a particular ideology").

"From the beginning the definition of mental retardation has been subjected to political forces that have caused it to be modified. Whether these modifications are desirable or not will, in part, depend on the observer's political orientation." Detterman & Gabriel, *supra*, WIMR at 135.

The definitions, and indeed even the name, of the condition at issue here have varied widely over the

years and between organizations because there is little scientific basis for drawing the line at a particular place, no treatment decision to serve as a check, and heavy influence of advocacy motives to affect government decisions. Those decisions have always included the provision of educational and other support services. Since *Atkins*, they now include the decision of whether to hold murderers fully responsible for their crimes. Those definitions should therefore not be elevated to a constitutional mandate, overriding the decision of the people as expressed through the legislative process.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be affirmed.

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Respectfully submitted,

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